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In the
Supreme Court of the United States

OCTOBER TERM, 1965

No. 1240

GREAT LAKES PIPE LINE COMPANY

Appellant

v.

THE COMMISSIONER OF TAXATION

Appellee

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MINNESOTA

JURISDICTIONAL STATEMENT

HAYNER N. LARSON
ERWIN A. GOLDSTEIN
FAEGRE & BENSON
1260 Northwestern Bank Building
Minneapolis, Minnesota 55402
Attorneys for Appellant

Of Counsel:
LEON B. SECK
General Counsel
JOHN W. DUNN
Tax Attorney
Great Lakes Pipe Line Company

Hayward-Court Brief Prtg. Co., Mpls., Minn. 55415

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THE COMMISSIONER OF TAXATION

Appellee

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MINNESOTA

JURISDICTIONAL STATEMENT

Appellant has appealed from a judgment of the Supreme Court of Minnesota entered on November 30, 1965, reversing a decision of the Minnesota Board of Tax Appeals (renamed Tax Court by Minnesota Session Laws 1965, Ch. 698, effective May 25, 1965) which reversed five orders of the state's Commissioner of Taxation, appellee, assessing additional Minnesota corporate franchise (income) taxes against appellant for the years 1955 through 1959. This statement is submitted to show that this Court has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

The opinion of the Supreme Court of Minnesota is reported in 272 Minn. —, 138 N.W. 2d 612 (1965). The decision of the Board of Tax Appeals is not officially reported; it is unofficially reported in 2 CCH Minn. Tax Rep., par. 200-342. The opinion of the Supreme Court, together with its judgment and its order denying a petition for rehearing, is set forth in Appendix B, *infra* (pp. B-1 to B-13). The decision of the Board of Tax Appeals appears as Appendix C, *infra* (pp. C-1 to C-9).

JURISDICTION

On April 23, 1963, pursuant to Minn. Stat. 1961, §271.-06, appellant filed notices of appeal to the Board of Tax Appeals (R. 3-7) from five orders of the Commissioner assessing additional corporate franchise (income) taxes against appellant for the years 1955 through 1959 (R. 1-2). The appeals were consolidated, and on December 30. 1964, the Board entered its decision reversing the Commissioner's orders. (App. C-1 to C-9.) On the Commissioner's petition, a writ of certiorari to review this order was issued by the state Supreme Court on January 12, 1965. (R. 53-54.) The opinion of that court was filed on November 12, 1965. A petition for rehearing was filed November 19, 1965, within the ten days allowed by the court's Rule XX. An order denying the petition was entered on November 30, 1965, as was also the judgment of the court reversing the order of the Board. (App. B-13.) Appellant's notice of appeal to this Court was filed in the Minnesota Supreme Court on February 24, 1966. Jurisdiction is conferred on this Court by Title 28, United States Code, §1257(2).

In its notices of appeal to the Board of Tax Appeals

appellant alleged that the Commissioner's orders had the effect of taking "the property of the appellant without due process of law, in violation * * * of the Fourteenth Amendment of the Constitution of the United States". (R. 7.) The Board was of the view that the pertinent Minnesota taxing statute, §290.17, clause (4), did not in terms reach the income whose inclusion in the measure of the tax was in dispute, and for this reason found it unnecessary to pass on the issue of due process. (App. C-6 to C-9.) It said, however, that were it otherwise, "grave questions of constitutionality would be presented." (App. C-9.)

On review, the Minnesota Supreme Court reversed. Differing from the Board, it construed clause (4) of §290.17 as including the income whose taxability was in dispute (App. B-10, B-11), and then held that as so construed clause (4) did not take appellant's property without due process; as to the latter it stated that the issue was "whether §290.17(4) so construed violates U.S. Const. Amend. XIV" and that the taxpayer contended that this construction "is violative of the due process clause of * * * the United States Constitution" (App. B-3 to B-6).

QUESTION PRESENTED

Appellant, a Delaware corporation whose general offices are in Missouri, derives income from investments in short-term interest-bearing Government and corporation paper purchased and held in New York with cash generated by its business—a ten-state common-carrier pipeline petroleum transportation business—in excess of the current operational needs of that business.

The question is whether the Due Process Clause of the Fourteenth Amendment permits this investment income,

which this Court has stated is taxable in full by the state of appellant's domicile, to be treated as though it were a part of appellant's apportionable operating income and be taxable also by the several states, including Minnesota, into which the transportation system extends.

STATUTES INVOLVED

The pertinent provisions of the Minnesota Income Tax Act (Minnesota Statutes 1953, Ch. 290) are set forth in Appendix A, *infra*. (App. A-1 to A-3).

STATEMENT

Appellant, a Delaware corporation with its general offices in Kansas City, Missouri, has been engaged since before 1955 solely in the business, as a common carrier, of owning and operating a system for the transportation of petroleum products by pipeline. (App. B-1.) The system extends through or into not less than nine (since 1957, ten) Midwest states, including Minnesota, where appellant has been authorized to do business. (App. B-1.) All contracts for transportation services are executed in Kansas City, all billing is done there, all collections thereon are made and deposited there, and all administrative and fiscal policies are managed there. (App. B-2, C-4.) Appellant does not engage in any marketing activities. (App. B-1.)

Funds representing income[1] produced by the pipeline

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[1]While both the Board (App. C-5) and the Supreme Court (App. B-2) speak on occasion only in terms of excess "income", it seems fair to say that they do so, not in a technical sense, but loosely as meaning cash. However, it is clear that, while cash may, for example, represent depreciation of capital, the funds consist at least in part of true income (R. 25(2)), and since appellant made no attempt to prove how much, if any, of the funds represented other than actual income, we must

business from time to time exceed the system's current operational needs. These funds are transferred from banks in Kansas City to a bank in New York and are there invested in short-term[2] Government obligations and prime commercial paper issued by unrelated corporations. (App. B-2, C-3 to C-4.) Maturities are selected so that the proceeds, including income, will be available to meet anticipated substantial periodic outlays such as quarterly income-tax payments, semi-annual interest and principal payments on long-term debentures, and dividend distributions. (R. 27(1), 31(3)-32(1); App. B-2 to B-3, C-4 to C-5.) The investment proceeds are deposited in the New York bank, from which they are thereafter either disbursed to meet such outlays as the foregoing or are transferred to Kansas City banks to keep accounts in balance or to meet other "business obligations." (R. 26-3, 27(2)-28(1); App. B-2.)[3] All decisions relating to the investments and to use of their proceeds are made in Kansas City, none in Minnesota. (App. B-2, C-4.) Custody of the instruments evidencing the investments is retained by the New York bank. (R. 24.) Appellant's purpose in making the investments is, as stated by the Minnesota Supreme Court (App. B-2 to B-3), "to keep the money earned through its pipeline transportation system producing income".

Minnesota imposes what is called an "annual excise tax"

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accept as correct the Supreme Court's statement (App. B-2) that the funds "constitute income derived from the operations of the pipeline transportation business". In appellant's view the point is immaterial.

[2]At the time of trial in May 1964 the average maturity was 78 days. (R. 32(3); App. C-5.)

[3]While we think it immaterial whether such periodic outlays as debenture installments are paid from New York or Kansas City bank accounts, we point out that the Supreme Court was in error in stating (App. B-2) that they are all paid from the latter.

upon any foreign corporation which, like appellant, is licensed to do a "local business" within the state. This tax is measured by the corporation's "taxable net income". § 290.02 (App. A-1). When, as in appellant's case, the "local business" is part of a business "carried on partly within and partly without" Minnesota, clause (4) of §290.17 (App. A-2) provides that "the entire income derived from such * * * business, including income from intangible property employed in such business, * * * shall be governed * * * by the provisions of section 290.19". Subd. 1 of §290.19 (App. A-3) provides in turn that the "taxable net income" of such business "shall be computed by deducting from the gross income of such business, wherever derived, deductions of the kind permitted by section 290.-09" of the same chapter and that the "remaining net income shall be apportioned to Minnesota" on the basis of an apportionment formula consisting, in the case of a taxpayer not manufacturing within Minnesota, of the three factors of tangible property, payroll, and sales, gross earnings, or receipts.[4]

Excluded from apportionable income reported in appellant's returns for 1955 through 1959 were the interest and gains realized on the investments described above. These items were added thereto by the Commissioner and deficiencies assessed accordingly. (App. B-3, C-1.) Upon appeal the Board of Tax Appeals reversed. It found (App. C-6) that appellant's "investment practices receive no benefit, service, or protection of any kind from the State of Minnesota", and concluded (App. C-6 to C-9) that the in-

[4]In appellant's case, a "barrel-mile" factor is substituted for the statutory third factor of "sales, gross earnings, or receipts". (R. 5(2).) In the case of a company manufacturing within Minnesota, the three factors are tangible property, payroll, and sales.

come from the investments was not "from intangible property employed in" the transportation business carried on in part within Minnesota within the meaning of clause (4) of §290.17 and hence was not includible in business income apportionable under §290.19. Under this view the Board found it unncecessary to pass on appellant's contention that the Commissioner's orders denied due process. (App. C-9.)

The Supreme Court disagreed with the Board's interpretation of clause (4) and held that appellant "derives profit from its investment practices and then uses that profit to pay its expenses and business obligations" and that such "use clearly constitutes employment of income from intangibles" in appellant's "business operations" within the meaning of clause (4). (App. B-11.) This construction of the statute we must accept as correct since it is binding on this Court. *International Harvester Co.* v. *Wisconsin Dep't of Taxation* (1944), 322 U.S. 435, 445. However, the Minnesota court held also that the statute as so construed and applied does not deprive appellant of its property without due process of law, in violation of the Fourteenth Amendment. (App. B-3 to B-6.) It is the validity of this latter conclusion that is challenged in this Court.

The Question is Substantial

1. It is appellant's view that the decision of the Minnesota Supreme Court goes beyond the extreme limit to which a non-domiciliary state has in the past been permitted by this Court to go, under the Due Process Clause, in laying a tax on, or measured by, net income derived by a foreign corporation from a business carried on both within and without the taxing state's borders. That limit is marked, we believe, by *Butler Bros.* v. *McColgan* (1942), 315 U.S.

501, and it is appellant's position that the Minnesota court has misread that decision and misapplied its principles.

The court below reads *Butler Bros.* as holding that if (a) the taxpayer has but one business and (b) the apportionment formula used by the non-domiciliary taxing state is a fair one, then the formula may be applied not only, as was the case in *Butler Bros.*, to all current operating income of the business, but also to non-operating investment income when the investments yielding such income were purchased with funds representing past operating income of the business, or when the income from the proceeds of the investments are available for use in the future "to pay various expenses and obligations" of the business. (App. B-8.)

Butler Bros., in our opinion, supports no such conclusion. On the contrary, it and the prior holdings of this Court which are cited therein make it plain that there is at least a third prerequisite to due process, and that is that the included income must be "fairly attributable" to activities within the taxing state.

In *Butler Bros.* the taxpayer, a wholesale merchandiser incorporated and having its home office in Illinois, had seven distributing houses, including one in California, the taxing state, where the taxpayer engaged only in selling. All purchasing was carried on elsewhere by a central buying division which, because it served all seven distributing houses, was able to buy at prices below those available to the several houses separately. The taxpayer contended that California could not lawfully tax more than the selling profits of the California distributing house. This Court answered that a portion of the savings effected at the central buying division was, in the words of the Court (p. 508), "fairly attributable" to the volume contributed by the Cali-

fornia distributing house, and that such savings were therefore includible in income subject to apportionment. In other words, while the buying profits emerged elsewhere, they represented income currently earned at least in part by the distributing houses, including that in California.

No like statement may be made as to the profits here in issue. Such a statement may be made, so far as this case is concerned, only with respect to the funds used to *purchase* the investments which yielded those profits. It is only *those* funds which represent income earned by business activities carried on in part in Minnesota. The profits here in issue are not in substance different from non-operating profits derived from the temporary investment of funds derived from other sources—from stockholders' capital contributions, for example—and it seems plain that for Minnesota to tax them goes beyond the limits of due process heretofore delineated by this Court. For state income taxes which do not contravene the Due Process Clause, this Court has said in *Northwestern States Portland Cement Co.* v. *Minnesota* (1959), 358 U.S. 450, 464, are those which "are levied only on that portion of the taxpayer's net income which arises from its activities within the taxing State."

Contrary to what the court below thought, a different conclusion is not required by the circumstance that appellant is engaged in but one business (its investment activities not being of sufficient stature, in the court's view (App. B-9), to warrant their classification as a separate business) and that appellant's one business, like that in *Butler Bros.* (p. 508), is a "unitary" one. (App. B-8 to B-9.) The answer, we believe, is indicated by what this Court said in *Hans Rees' Sons* v. *North Carolina* (1935), 283 U.S. 123, 133-134:

> the fact that the corporate enterprise is a unitary one, in the sense that the ultimate gain is derived from the entire business, does not mean that for the purpose of taxation the activities which are conducted in different jurisdictions are to be regarded as "component parts of a single unit" so that the entire net income may be taxed in one state regardless of the extent to which it may be derived from the conduct of the enterprise in another state. * * *

While it is entirely proper to say that the funds which appellant used to purchase its security investments represented profits which were "fairly attributable" to activities conducted in part within Minnesota, no like statement may be made in respect of the profits which were in turn produced by those investments. These latter profits were at least one step removed from any Minnesota transactions. This Court said in *Wisconsin* v. *J. C. Penney Co.* (1940), 311 U.S. 435, 444-445, that "the sole constitutional test" of the existence of a state's power to tax under the Due Process Clause is "whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return." It is clear that a tax by Minnesota on the profits derived by appellant from operation of the Minnesota portion of its transportation system meets this test. But it seems equally clear that a tax by Minnesota on the income earned elsewhere on securities purchased with those profits does not.[5]

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[5]It is not without significance that the Minnesota Supreme Court made no reference to the finding of the Board of Tax Appeals (App. C-6) that appellant's "investment practices receive no benefit, service, or protection of any kind from the State of Mnnesota."

2. This Court has never, so far as we are aware, indicated that there is any constitutional barrier to taxation of income by more than one state. Indeed, it has stated, obiter but unqualifiedly, in *Curry* v. *McCanless* (1939), 307 U.S. 357, 368, that "income may be taxed both by the state where it is earned and by the state of the recipient's domicile", and this is generally accepted as representing the present state of the law. See *Federal Limitations on State Taxation of Interstate Business*, 75 Harvard Law Review 953, 1005-1006.[6]

Yet multiple taxation undeniably is or can be an evil, potentially as well as actually. It has been said that "it seems probable" that the risk of multiple taxation "undesirably affect[s] business decisions and the flow of investment capital." *Ibid.*, p. 1017. And this Court pointed out as recently as a year ago in *Gen. Motors* v. *District of Columbia* (1965), 380 U.S. 553, in placing a narrow construction upon statutory authority given to taxing administrators to prescribe apportionment formulas for purposes

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[6]The cited article, in note 293 on p. 1006, lists *Cargill* v. *Spaeth* (1943), 215 Minn. 540, 10 N.W. 2d 728, among decisions which "have assumed that commercial domicile may justify taxation of all the taxpayer's income". It was there held (p. 550), in case No. 33483, that a foreign corporation doing a warehouse and elevator business in several states but having its commercial domicile in Minnesota is taxable in that state upon all its interest-income on accounts receivable arising in the regular course of business (p. 542). In inexplicable and sharp contrast to its holding in the present case that investments in non-operating securities are *used* in the taxpayer's business and hence that the income therefrom is apportionable in part to Minnesota under clause (4) of §290.17, the court in *Cargill* held that the accounts receivable, notwithstanding that they represented the extension of credit in the direct course of the taxpayer's business, were *not* used in that business and therefore that the interest thereon was assignable to Minnesota in toto under a forerunner (p. 544, note 3) of clause (2) of §290.17 (App. A-1).

of a tax laid in statutory terms on income "fairly attributable" to business carried on in the taxing jurisdiction, that to do otherwise (pp. 556-557) would create "substantial dangers of multiple taxation" and (p. 560) might "tend to result in the unhealthy fragmentation of enterprise and an uneconomic pattern of plant location". Moreover, in the report of the Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary, entitled *State Taxation of Interstate Commerce*, prepared and submitted pursuant to Title II of Pub. L. 86-272 (73 Stat. 555) as amended, the subcommittee begins the summary of its findings on state income taxation with this statement (H. Rep. 1480, Vol. 1, p. 414):

> In the system of State income taxation as it operates today, many companies engaged in interstate commerce are not treated on a level of equality with the one-State company, and some are taxed on less. The result is not only inequity between the interstate company and the one-State company, but an even greater inequity among the interstate companies themselves.

In *Butler Bros.* this Court held, as already noted, that a state tax does not deny due process if it is measured by net income "fairly attributable" to the business done within the taxing state. If, as appears to be the case, the Due Process Clause interposes no barrier to the taxation of appellant's entire investment income by the state of its domicile, then manifestly the decision of the court below opens the door to the excessive burdens of multiple taxation. It does so, moreover, not only in respect of income which, as in *Butler Bros.*, is directly attributable to activities carried on within Minnesota, but also, as indicated above, in respect of income

at least one step removed therefrom. If, as this Court made clear in *Gen. Motors,* it was desirable that the phrase "fairly attributable", as used in the statute there in issue, be so construed as to avoid or reduce multiple taxation, then we suggest to the Court that it is equally desirable for the same reason that the same phrase as used in *Butler Bros.* be so interpreted as to put non-operating income from marketable securities beyond the reach of the taxing power of a nondomiciliary state which has already taxed its fair share of the operating income used to purchase those securities. Doing so would contribute substantially to reducing the danger of inequitable multiple taxation.

3. The issue raised by this appeal is important not only to the appellant but also, we believe, to scores, and perhaps hundreds, of other taxpayers as well. Complete information as to the number of taxpayers with respect to whom the issue has been raised administratively in Minnesota alone is not available to appellant; such information is available only to the appellee. But the number in Minnesota alone must be substantial. For appellant is reliably informed, and is authorized by the taxpayers concerned to state, that precisely the same issue is currently pending administratively with respect to Freeport Sulphur Company, American Can Company, Skelly Oil Company, Walgreen Company, and The Gillette Company, among others. In addition, the issue is pending again before the Minnesota Supreme Court on certiorari to review a decision adverse to appellee filed by the Board of Tax Appeals on June 10, 1965, in a case involving Montgomery Ward. See *Montgomery Ward & Co., Inc.* v. *Commissioner of Taxation,* 2 CCH Minn. Tax. Rep., par. 200-360.

Moreover, there are at least thirty-seven states besides

Minnesota which have "either corporate net-income taxes or franchise taxes based on net income" (House Rep. No. 1480, *supra*, p. 102), and it is not at all uncommon for corporate taxpayers, particularly those of substantial size, to hold "government securities" or "other marketable securities" or "short-term investments" (see, for example, Moody's Industrial Manual, June 1965, pp. 35, 46, 50, 66, 72, 88, 474, 489, 497, 517, 549, 573, 586, 604, 607, 623, 771, 791, 955, 964, 1126). It is not unreasonable in these circumstances to suppose that the issue is one which currently does or can affect countless non-domiciled taxpayers doing business in one or more of these other thirty-seven states as well as in Minnesota.

The conclusion appears unavoidable that the question is one of substantial importance.

Respectfully submitted,

HAYNER N. LARSON
ERWIN A. GOLDSTEIN
FAEGRE & BENSON
1260 Northwestern Bank Building
Minneapolis, Minnesota 55402
Attorneys for Appellant

Of Counsel:
LEON B. SECK
General Counsel
JOHN W. DUNN
Tax Attorney
Great Lakes Pipe Line Company

[redacted]

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APPENDIX A

Statutes Involved

Minnesota Statutes 1953:*

290.02 EXCISE TAX ON CORPORATIONS; IMPOSITION, MEASUREMENT. An annual excise tax is hereby imposed * * * upon every foreign corporation, except those included within section 290.03 [engaged exclusively in interstate or foreign commerce], for the grant to it of the privilege of transacting or for the actual transaction by it of any local business within this state during any part of its taxable year, in corporate or organized form.

The tax so imposed shall be measured by such corporations' taxable net income for the taxable year for which the tax is imposed, and computed in the manner and at the rates provided in this chapter.

290.17 GROSS INCOME, ALLOCATION TO STATE. Items of gross income shall be assigned to this state or other states or countries in accordance with the following principles:

* * * * *

(2) * * * Income or gains from intangible personal property not employed in the business of the recipient of such income or gains, and from intangible personal property employed in the business of such recipient if such business consists principally of the holding of such property and the collection of the income and gains therefrom, wherever held and whether in trust or otherwise, shall be assigned to this state if the recipient thereof is domiciled within this state; * * *

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*The quoted statutes have remained unchanged since before 1955, the earliest year in issue.

(3) Income derived from carrying on a trade or business * * * shall be assigned to this state if the trade or business is conducted wholly within this state, and to other states if conducted wholly without this state. * * *

(4) When a trade or business is carried on partly within and partly without this state, the entire income derived from such trade or business, including income from intangible property employed in such business and including, in the case of a business owned by natural persons, the income imputable to the owner for his services and the use of his property therein, shall be governed, except as otherwise provided in sections 290.35 and 290.36 [relating to insurance and investment companies], by the provisions of section 290.19, notwithstanding any provisions of this section to the contrary. This shall not apply to business income subject to the provisions of clause (1) [relating to personal services].

(5) All other items of gross income shall be assigned to the taxpayer's domicile.

290.18 TAXABLE NET INCOME, ADJUSTED GROSS INCOME; COMPUTATION. Subdivision 1. *Taxable net income*. The taxable net income shall, except insofar as section 290.19 is applicable, be computed by deducting from the gross income assignable to this state under section 290.17 deductions of the kind permitted by section 290.09 in accordance with the following provisions:

(1) Such deductions shall be allowed to the extent that they are connected with and allocable against the production or receipt of such gross income assignable to this state;

(2) That proportion of such deductions, so far as not

connected with and allocable against the production or receipt of such gross income assignable to this state and so far as not connected with and allocable against the production or receipt of gross income assignable to other states or countries and so far as not entering into the computation of the net income assignable to this state under section 290.19, shall be allowed which the taxpayer's adjusted gross income from sources within this state, as determined under section 290.17, clauses (1), (2), (3) and (5), bears to his adjusted gross income from all sources, including that entering into the computations provided for by section 290.19; * * *

290.19 NET INCOME; ALLOCATION TO STATE, METHODS. Subdivision 1. *Computation, business conducted partly within state; apportionment.* The taxable net income from a trade or business carried on partly within and partly without this state shall be computed by deducting from the gross income of such business, wherever derived, deductions of the kind permitted by section 290.09, so far as connected with or allocable against the production or receipt of such income. The remaining net income shall be apportioned to Minnesota as follows:

> [Here follow arithmetical apportionment formulas and provision for use, in limited circumstances, of "the separate or segregated accounting method". The apportionment formula applicable to a taxpayer which, like appellant, does no manufacturing within Minnesota consists of three factors—tangible property, payroll, and sales, gross earnings, or receipts.]

Subd. 3. *Application of sections 290.17 and 290.18.* Nothing in this section shall prevent the application of sections 290.17 and 290.18 to that portion of a taxpayer's income which is not from a trade or business carried on partly within and partly without this state.

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APPENDIX B

State of Minnesota, Supreme Court
(Caption and Syllabus omitted)

OPINION

NELSON, Justice.

Certiorari on the relation of the commissioner of taxation to review a decision of the Board of Tax Appeals. Five orders issued by the commissioner imposing additional income taxes for the years 1955 through 1959 were appealed to the board by the respondent taxpayer, Great Lakes Pipe Line Company, and there consolidated for trial and decision since the issues arising out of the orders were the same. The board reversed all of the orders.

Respondent is a Delaware corporation with its general and supervisory offices located in Kansas City, Missouri. It is engaged as a common carrier for hire in the sole business of transporting refined petroleum products by pipeline. During the period in question it operated both within and without Minnesota, its pipeline system extending into a nine-state area comprised of the States of Illinois, Iowa, Kansas, Missouri, Nebraska, North Dakota, Oklahoma, South Dakota, and Minnesota. In 1957 it also extended its system into Wisconsin.

Respondent has been authorized to do business in Minnesota since 1953, paying a franchise tax pursuant to Minn. St. 290.02. The company does not engage in any marketing activity within the state nor does it maintain any manufacturing facilities here. It does, however, own and maintain the pipeline extending into Minnesota as well as its terminal storage facilities connected therewith, in which petroleum is stored until the company is notified by

the shipper where a final delivery of petroleum from the Minnesota storage facilities is to be made. All maintenance services performed on the pipeline and terminal facilities located within the State of Minnesota are performed here by respondent's employees. All contracts and agreements for transportation services through respondent's pipelines are negotiated and executed at the offices in Kansas City, in accordance with tariffs filed with the approval by the Interstate Commerce Commission.

It appears from the record that there are periods of time between maturity dates of major company obligation when the income from the company's pipeline business accumulates and temporarily becomes excess funds. These funds are transferred from the company's Kansas City banks to a bank in New York to be there utilized as investment funds. The securities generally purchased with these funds consist of short-term government obligations—several million dollars worth during the time in question—and prime commercial paper issued by unrelated obligors. The monies transferred by respondent into the account with the New York bank constitute income derived from the operations of the pipeline transportation business, the securities being purchased by the bank as respondent's agent upon telephoned instructions from its financial officers in Kansas City. As these securities mature and are redeemed, the proceeds are redeposited in the New York bank, as is the income from the securities. As income taxes, debenture indebtedness, and other of its various business obligations become due, respondent transfers these funds from the New York bank account to its banks in Kansas City for use in discharging the obligations. It is clear that the company's purpose in buying the various short-term securities is to

keep the money earned through its pipeline transportation business producing income, and the record is clear that the securities in question have always appeared on the balance sheet and financial statements of the company as current assets. It is undisputed that all of the intangibles owned by respondent are short-term, the respondent forecasting its various cash needs by computer and making investments accordingly, always attempting to time maturity dates of the securities with forthcoming business obligations.

Respondent timely filed its Minnesota income tax returns for the years 1955 through 1959 in accordance with the provisions of Minn. St. c. 290. The return for the year 1955 disclosed a total tax of $51,311.85 due on the income reported, which amount respondent paid. This amount was computed through the use of the three-factor formula composed of tangible property, payroll, and barrel-mile factors applied to respondent's net earnings solely from its petroleum transportation business. The commissioner of taxation, after duly auditing the foregoing return, determined that the audit disclosed a deficiency of $2,125.72 plus interest in the amount of $596.94, resulting in a total deficiency of $2,722.66, for which the commissioner made an additional assessment against respondent on March 22, 1963. The additional assessment of $2,125.72, resulted from treating the interest from and gains on the government securities and commercial paper held by respondent as income subject to apportionment under §290.19. Similar additional assessments were ordered for the other years in question.

The issues before this court are whether, under the facts appearing of record, the intangibles owned by respondent

were employed in its business within the meaning of §290.17(4) so as to require the income therefrom to be included in income apportionable to the State of Minnesota under §290.19, and whether §290.17(4) so construed violates U. S. Const. Amend. XIV and Minn. Const. art. 1, §7. Section 290.17(4) provides in part as follows:

> "When a trade or business is carried on partly within and partly without this state, the entire income derived from such trade or business, *including income from intangible property employed in such business* and including, in the case of a business owned by natural persons, the income imputable to the owner for his services and the use of his property therein, shall be governed, except as otherwise provided in sections 290.35 and 290.36 by the provisions of 290.19, notwithstanding any provisions of this section to the contrary." (Italics supplied.)

1-2. In In re Petition of S. R. A., Inc. 213 Minn. 487, 488, 7 N. W. (2d) 484, 485 this court said:

> "Taxes are pecuniary charges imposed by the legislative power to raise money for public purposes—a burden imposed to supply the very lifeblood of the state."

Taxes on corporations doing business within this state are imposed for that privilege and for the protection the state affords to them, and taxpayers are required to keep in mind the established policy contained in the foregoing statement. This court is also required to keep this policy in mind in reviewing decisions made by the Board of Tax Appeals.

Respondent contends that taxation of the income derived from its intangibles is violative of the due process clause of both the United States Constitution and of Minn. Const.,

art. 1, §7. It contends that the business of creating such income is not carried on within this state at all and that Minnesota is therefore prohibited from taxing the income therefrom.

The United States Supreme Court has discussed the constitutional requirements in Butler Brothers v. McColgan, 315 U. S. 501, 62 S. Ct. 701, 86 L. ed. 991. In the Butler Brothers case an Illinois corporation was qualified to engage in business within the State of California. The corporation purchased wholesale dry goods and general merchandise in quantity from manufacturers and in turn resold the goods to retailers at a profit. One wholesale distributing house was located in California. The corporation's own computation of income allocated to California resulted in a loss. The tax commissioner of California, however, allocated a percentage of the corporation's total profit from its total operations by using a formula determined by averaging percentages which (a) value of real and tangible personal property, (b) wages, salaries, commissions and other compensation to employees, and (c) gross sales attributable to the California wholesale distributing house bore to the corresponding items of all houses of the corporation. The court held that in the application of a state statute imposing on corporations doing business within and without the state a franchise tax measured by a percentage of the net income derived from business within that state, a formula which is "fairly calculated" to allocate to the state that portion of the net income "reasonably attributable" to the business done there satisfies the requirements of the Fourteenth Amendment. 315 U. S. 506, 62 S. Ct. 704, 86 L. ed. 995.

The three-factor formula found in §290.19, subd. 1(2)

(a), is based on factors similar to those used in California. While the formula used in Minnesota is not exactly the same, it appears to be as fair and adequate as the California one. If applied properly, the income the Minnesota formula reaches will be as "reasonably attributable", to Minnesota as the income of the taxpayer was to California in the Butler Brothers case. The use of the Minnesota formula has been held to be in accord with constitutional principles by this court in Walgreen Co. v. Commr. of Taxation, 258 Minn. 522, 104 N. W. (2d) 714, appeal dismissed, 365 U. S. 767, 81 S. Ct. 912, 6 L. ed. (2d) 189. We also said in the Walgreen case (258 Minn. 530, 104 N. W. [2d] 719):

> "That application of the 3-factor formula may result in some overlapping of measures of net income as between states is not fatal to the honest efforts of a state to determine what would be a fair approximation of the income of a multistate unitary business."

3-4. The Board of Tax Appeals found that respondent's sole business in Minnesota was the transportation of refined petroleum products by pipeline and that there was no connection between respondent's operations in Minnesota and its investment activities and the income gained from such activities. These findings raise the basic question of whether respondent is upon the record herein, engaged in a unitary business under the statutes of this state.

We have considered the nature of a taxpayer's multistate business operations several times. We made it clear in Western Auto Supply Co. v. Commr. of Taxation, 245 Minn. 346, 71 N. W. (2d) 797, that whether a number of business operations having common ownership constitute a single or unitary business or several separate businesses for

tax purposes depends upon whether they are of mutual benefit to one another and on whether each operation is dependent on or contributory to others. There, we found the business unitary.

In Skelly Oil Co. v. Commr. of Taxation, 269 Minn. 351, 131 N. W. (2d) 632, the taxpayer was a foreign corporation engaged in the production business wholly outside Minnesota and in the marketing business outside and within the state. The production and marketing operations were functionally and completely separate and distinct from each other, the responsibility for such operations being borne by completely independent and separate departments. The Board of Tax Appeals found that the company was engaged in two separate businesses, but that they were integrated to some extent for tax purposes and that some income from the production business was apportionable to Minnesota. In view of the finding that all income from production was earned from operations completely independent of any carried on by the marketing department, this court reversed, holding that (269 Minn. 372, 131 N. W. [2d] 646)—

> "* * * [the state] may not include any production-operations income if it does not appear that the included portion is fairly attributable to the marketing operations reaching into this state."

The most recent decision this court has rendered on what constitutes a unitary business is Maurice L. Rothschild & Co. v. Commr. of Taxation, 270 Minn. 245, 133 N. W. (2d) 524. The taxpayer in that case operated three retail stores in Chicago and three in the Minneapolis-St. Paul area. The Board of Tax Appeals found that for tax purposes there was sufficient integration to treat the business as a

unitary one, citing such factors as general management consultations, interstore movement of goods, and price concessions due to volume purchases as indicative of a single business. We affirmed, applying the tests enunciated in Western Auto Supply Co. v. Commr. of Taxation, *supra*, and holding the taxpayer's business operations constituted a unitary business under the rule that a multistate business is a unitary business when the operations conducted in one state benefit and are in turn benefited by the operations in another state.

The facts in the instant case show that respondent's investment practices and its pipeline activities have been, throughout the period here involved, of mutual benefit to one another. The testimony of respondent's own witness was that the pipeline activities produce the income which purchases the intangibles and that sooner or later the increase, gain, and principal of these intangibles is used entirely to pay various expenses and obligations of the pipe line activities. There are no indications from the testimony submitted that separate businesses exist. In fact, Mr. J. T. Robb, manager of respondent's financial division and a former treasurer and controller of the company, testified that he and the company treasurer decided upon and handled the purchase of its short-term securities and that the income and proceeds from sales of such securities were deposited in respondent's New York bank account without attempting to keep them separate from other items deposited in the account. Another fact indicative that respondent's business was unitary is the showing of these securities on respondent's financial statement at all times as current assets. Even though respondent may argue that this fact is of little significance, it can be said without fear

of contradiction that the credit standing of the company was definitely improved when its balance sheet showed securities worth nearly $11,000,000. Since there exists no departmentalization for the conduct of the pipeline operations and of the investment program, and there are no financial officers responsible solely for securities investment, the case is unlike Skelly Oil Co. v. Commr. of Taxation, *supra,* and the only justifiable conclusion is that respondent is conducting one business only, single and unitary in scope.

5-6. In oral argument respondent relied to some extent on two cases: Marshall-Wells Co. v. Commr. of Taxation, 220 Minn. 458, 20 N. W. (2d) 92, and Cargill, Inc. v. Spaeth, 215 Minn. 540, 10 N. W. (2d) 728, as authority for its position that the commissioner's interpretation of Minn. St. c. 290, and specifically §§290.02, 290.17(4), and 290.19, as applied to its short-term securities, deprived it of its property without due process of law. An analysis of the Marshall-Wells and Cargill cases discloses that in each the taxpayers had established a commercial domicile in the State of Minnesota, a factor entirely absent in the instant case. It discloses also that these cases recognize that a state's taxing power may reach income from intangibles located outside the state but correlated to a business conducted within the state. In the Marshall-Wells case, this court said (220 Minn. 462, 20 N. W. [2d] 94):

> "Generally speaking, a state may tax any privilege extended by it and may adopt any reasonable rule for the measurement of such tax, *provided it is not measured by property, or income from property, not within its jurisdiction and not used in connection with or correlated to any business authorized or conducted in*

> *the state*. A attempt by the state to exercise its taxing authority upon property located and used *beyond* its jurisdiction constitutes a taking without due process of law. [Citations omitted.]"

We cannot, upon the record in this case, agree with respondent's contention that its payment of income taxes, interest, dividends, and other obligations of the company from the income earned on its investments does not constitute employing such investments in its business as a single enterprise under the taxing statutes of this state.

In Wayne Pump Co. v. Commr. of Taxation, Minn. B.T.A., Docket No. 222, May 13, 1946, a Maryland corporation engaged in manufacturing in the State of Indiana and qualified to do business in the State of Minnesota, perfected and manufactured a computer device to register quantity as well as cost of gasoline. The company licensed the use of the device to other companies. The issue before the Board of Tax Appeals was whether the patent which created the royalty income there in dispute was "employed" in the taxpayer's business for tax purposes. The board held:

> "* * * Profit is the generative spark of Taxpayer's, as it is of all private business enterprise. It can hardly be said that an intangible used in support of the price structure, upon which the corporate profit depends in not 'employed in the business'."

Minn. St. 290.17(4) was construed by the Board of Tax Appeals in Swift & Co. v. Commr. of Taxation, B.T.A., Docket No. 622, Feb. 26, 1957. The board said in its opinion there:

> "The sole issue here presented for determination is whether interest income received by the Taxpayer in 1951 on federal and state income tax refunds is

apportionable income received from intangible property employed in Taxpayer's business."

Citing §290.17(4) as controlling, the board continued:

"The words, 'income from intangible property employed in such business' as used in Section 290.17 subd. 4, have previously been given a liberal interpretation by the Minnesota Board of Tax Appeals and the Supreme Court so as to include income *integrated with or used* in such business [citing Cargill, Inc. v. Spaeth, 215 Minn. 540, 10 N. W. (2d) 728], or *used in connection with* or *correlated to* such business [citing Marshall-Wells Co. v. Commr. of Taxation, 220 Minn. 458, 20 N. W. (2d) 92], or * * * *an integral part of* or *related to* such business [citing Minnesota Tribune Co. v. Commr. of Taxation, 228 Minn. 452, 37 N. W. (2d) 737]." (Italics supplied.)

The foregoing definitions of what constitutes "employment" of intangibles in a business cannot be overlooked. The taxpayer in the instant case derives profit from its investment practices and then uses that profit to pay its expenses and business obligations. This use clearly constitutes employment of income from intangibles in respondent's business operations.

Since the securities involved in the instant case are "related to," "form an integral part of," are "correlated to," and "used in connection with" respondent's pipeline business, a unitary one, operated within and without Minnesota, we conclude that the record amply establishes that respondent employed these intangibles in its pipeline business.

In reviewing an order of an administrative board, this court will go no further than to determine (1) whether the board kept within its jurisdiction; (2) whether the board

proceeded on a correct theory of the law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question. Oliver Iron Min. Co. v. Commr. of Taxation, 247 Minn. 6, 76 N. W. (2d) 107; Red Owl Stores, Inc. v. Commr. of Taxation, 264 Minn. 1, 117 N. W. (2d) 401; Minn. St. 271.10, subd. 1.

Applying the foregoing rule to the facts in the instant case, we are left no alternative but to reverse the decision of the board. We find no evidence which reasonably supports respondent's contention that the investment income is not fairly attributable to Minnesota under §290.17(4). We recognize the rule that if the directions of a statutory provision are unclear, the interpretation should favor the taxpayer; but the factual record here will not support a finding in respondent's favor.

The issue of double taxation has also been raised by respondent. This court in State v. Northwest Airlines, Inc. 213 Minn. 395, 407, 7 N. W. (2d) 691, 697, affirmed, 322 U. S. 292, 64 S. Ct. 950, 88 L. ed. 1283, 153 A. L. R. 245, rehearing denied, 323 U. S. 809, 65 S. Ct. 26, 89 L. ed. 645, rejected a similar argument and said:

> "* * * *The possibility* of taxation of the same property by more than one state is no longer a constitutional objection." (Italics supplied.)

See, Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 462, 79 S. Ct. 357, 364, 3 L. ed. (2d) 421, 429.

Respondent is not entitled to exclusion of its income earned on intangibles consisting of short-term securities purchased with proceeds derived from its pipeline opera-

tions and used in its pipeline business. The commissioner of taxation properly determined such income to be taxable under §§290.17(4) and 290.19.

Revised.

Judgment

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjuged that the order of the Board of Tax Appeals be and the same hereby is in all thing reversed.

And it is further determined and adjudged that relator herein, do have and recover of respondent herein the sum and amount of Four Hundred Thirty-Six and 80/100 Dollars ($436.80) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed November 30, 1965.

BY THE COURT
Attest:
Mae Sherman Clerk.

[Cost statement and Clerk's certificate omitted.]

Order Denying Petition for Rehearing

SIR:

You will please take notice that on this date the following order was entered in the above entitled cause:

ORDERED, that the petition for reargument herein be and the same hereby is denied and stay vacated.

[Dated November 30, 1965.]

Yours respectfully,
MAE SHERMAN,
Clerk Supreme Court.

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APPENDIX C

Decision of Board of Tax Appeals

(Caption omitted)

ORDER ENTERED DECEMBER 30, 1964

Docket Nos. 1150, 1151, 1152, 1153 and 1154

Appellant taxpayer, a Delaware corporation licensed to do business in Minnesota, was during the years in question, 1955 through 1959, engaged in the business of transporting refined petroleum products by pipeline as a common carrier for hire under the authority and jurisdiction of the Interstate Commerce Commission. Its activities as such common carrier were conducted partly within and partly without the State of Minnesota.

Appellant filed tax returns of its income taxable in this state for the years involved under the provisions of Chapter 290, Minnesota Statutes Annotated. These tax returns omitted interest from and gains on intangible personal property, i.e., short term United States Government Bonds and commercial paper managed, held and controlled by Appellant at its general office in Kansas City, Missouri.

The Appellee, Commissioner of Taxation, after audit of these returns made his Orders assessing additional taxes based upon such omitted interest and gains.

Appellant taxpayer contends the Orders are without statutory authority and violate due process because the acquisition of interest and gain from said short term investments was not an "integral part" of its pipeline business and because such income is not attributable to transactions or activities carried on within Minnesota.

John W. Dunn, Kansas City, Missouri, Attorney for Appellant; Ralph W. Peterson, Special Assistant Attorney General, for Appellee.

FINDINGS OF FACT

William W. Essling

A written Stipulation of Facts has been filed with the Board. From said Stipulation and additional evidence presented at the hearing, and it being agreed that the appeals in Docket Nos. 1150 through 1154 may be consolidated and the decision of the Board may apply to all, the Board makes the following Findings of Fact:

1. The Appellant is a corporation organized and existing in the State of Delaware with all of its general administrative and supervisory offices located in the Bryant Building, Kansas City, Missouri.

2. The Appellant does business both within and without the State of Minnesota and has been continuously authorized to do business in this State since October 15, 1953.

3. The sole Minnesota business of the Appellant is the transportation of refined petroleum products by pipeline.

4. The Appellant is a common carrier for hire, operating under the authority and within the jurisdiction of the Interstate Commerce Commission.

5. The Appellant is not engaged, either within or without the State of Minnesota, in the business of manufacturing tangible personal property.

6. During the period in question herein, the Appellant

transported refined petroleum products throughout the nine-state area comprised of the States of Illinois, Iowa, Kansas, Minnesota (including transportation between Pine Bend and St. Paul Park, and Alexandria, Minnesota), Missouri, Nebraska, North Dakota, Oklahoma, and South Dakota, in accordance with tariffs filed with and approved by the Interstate Commerce Commission. In 1957, the Company's pipeline system was extended into Wisconsin.

7. Such tariffs provide for the payment by shippers of specified rates for each barrel of such products so transported.

8. The Appellant timely filed its Minnesota State Income Tax Returns for the years 1955 through 1959, inclusive, and paid the tax shown on the faces thereof.

9. The Commissioner of Taxation, after duly auditing said returns, proposed the assessment of additional taxes, and on March 22, 1963, issued his Orders assessing additional taxes accordingly.

Of the items giving rise to said proposals and Orders, only one is herein in issue, the others being disposed of by the parties hitherto. The sole item remaining involves interest from, and gains on, United States Governmend Bonds and prime commercial paper owned by the Appellant. The Orders of the Commissioner of Taxation treat this income as subject to apportionment under Minnesota Statutes, Section 290.19.

10. Said prime commercial paper was purchased through Morgan Guaranty Trust Company, agent, from the following corporate debtors whose state of incorporation is placed opposite: General Electric Credit Corporation, New York; General Motors Acceptance Corporation,

New York; International Harvester Credit Corporation, Delaware; Yellow Manufacturing Acceptance Corporation, Delaware; Associates Investment Company, Indiana; Commercial Credit Company, Delaware; Commercial Investment Trust, Inc. (now C.I.T. Financial Corporation), Delaware; and Pacific Finance Corporation, Delaware.

11. All said corporate debtors are wholly unrelated to the Appellant in any other manner.

12. The personal administrative and supervisory offices of Appellant are in Kansas City, Missouri. All of Appellant's contracts for its pipeline services are executed in Kansas City, Missouri. All of Appellant's billing for services is done in Kansas City, Missouri. The bills are collected by sight drafts deposited for collection in Appellant's Kansas City, Missouri, banks. No credit is extended to Appellant's customers in Minnesota or elsewhere.

13. The sight drafts issued upon billing for pipeline services are paid into appellant's banks at Kansas City, Missouri; all transactions resulting from pipeline services in Minnesota and elsewhere are then complete, and the income from such services is in the possession or control of Appellant at Kansas City, Missouri.

14. Appellant's income from its pipeline activities thus accumulated at Kansas City, Missouri, is then, by its administrative and fiscal policies managed and conducted at Kansas City, Missouri, assigned to and disbursed for the expenses and debts of the company such as operational expenses, taxes, dividends, debenture payments, and other items.

The fiscal experience of Appellant is that all of its various expenses and indebtednesses do not become due or ma-

ture at the same time. By means of estimates and projections, Appellant can fairly determine its pipeline business income and approximately eighty-five (85%) of its expenses for the immediate future. The Appellant's experience in each year is that there are periods of time between the maturity dates of major obligations when the income from the pipeline business accumulates and temporarily becomes excess funds.

15. Appellant maintains bank accounts in New York City and, in particular, with the Morgan Guaranty Bank of that city. Funds of Appellant deposited in that bank are used principally for the payment of installments on long term debentures, short term investments and for transfer to Kansas City, Missouri, when the occasion arises.

Appellant's deposits of funds with the Morgan Guaranty Bank of New York come in substantial measure from the periodic accumulations of said temporary excess income of the pipeline business. These funds are, via the mechanisms of the banking world, transferred from Appellant's Kansas City, Missouri, banks to the Morgan Guaranty Bank at New York City.

Appellant's fiscal officers at Kansas City, Missouri, then direct the Morgan Guaranty Bank to purchase certain short term securities. These securities consist of short term United States obligations and other prime commercial paper as set forth in the Stipulation and Finding of Fact No. 10 supra.

These short term securities are bought, mature, or sold rapidly so that Appellant's portfolio thereof has a 78 day average. Upon maturity or sale, the proceeds are received by the Morgan Guaranty Bank of New York for Appellant and disbursed or transferred to Kansas City, Missouri, in accordance with the requirements of Appellant.

16. The interest or gain from said short term investments have no direct connection or link with the Minnesota or other pipeline activities of Appellant. No part of the investment transaction occurs in Minnesota or because of the Minnesota activities of Appellant.

The said short term investments are not an integral part of the business conducted by Appellant in Minnesota and the interest or gain therefrom has no connection therewith except that the funds producing said income or gain is originally derived in part from Appellant's Minnesota activities. These short term securities are at times carried on Appellant's balance sheets and financial statements as current assets because they are the property of and are owned by Appellant.

17. The income or gain from said short term investments have no physical situs, commercial domicile, or other direct connection or link with the State of Minnesota, and the Appellant's said short term investment practices receive no benefit, service, or protection of any kind from the State of Minnesota.

DECISION

The Orders of the Commissioner dated March 22, 1963, here involved are hereby reversed insofar as the same allocate or apportion the income or gain from the short term securities here involved to Minnesota for tax purposes.

MEMORANDUM

The position of the Attorney General is based entirely on the provisions of Minnesota Statutes Annotated 290.17 (4). At first reading this section of the taxing statute would seem to lend support to the Orders including the short

term investment income in the income which is partly allocated to Minnesota. We do not so construe this provision. The section requires that the particular business referred to be carried "partly within and partly without this State". That is true of the pipeline activity of Appellant but is not the fact as to the investment practices engaged in after the pipeline activity is complete and its income on hand for investment. The section permits "the entire income derived from *such trade or business,* including income from intangible property *employed in such business* * * *" to be apportioned. We take this reference to "such trade or business" to strictly mean the trade or business conducted in Minnesota or partly within and partly without Minnesota or that so directly connected with it as to fairly reflect the activity in Minnesota and the governmental benefit obtained from Minnesota. That is clearly not so with respect to the investment practices carried on completely outside Minnesota and in Missouri and New York. The State Government of Minnesota in no way serves or benefits the subsequent investment of pipeline income. This section requires that income from intangible property before it be included in the income to be apportioned be "employed in such business". We take this to be an additional and further admonition that such income from intangibles in order to be included in the income to be apportioned be directly employed in the business conducted in Minnesota or partly within and partly without Minnesota to be so directly connected therewith as to fairly reflect the income producing activity in Minnesota and the benefits, services, or protection afforded by the State Government of Minnesota. This is not at all the case with respect to the subsequent investment of pipeline income partly acquired from the Minnesota activity.

If it can be said that the directions of this statutory provision are not entirely clear in this respect then the interpretation should favor the taxpayer.

Considering this provision (M.S.A. 290.17(4)) with its companion provisions of Minnesota Statutes Annotated, Chapter 290, it seems clear that the legislative intent was to reach only that income, through apportionment, that has a direct and significant relation to Minnesota activity. It seems to us that mere ownership of short term investments that are in no other way situated, localized, or connected with a Minnesota activity is not such a relationship. This seems to be the rationale of the entire tax chapter, Minnesota Statutes Annotated, Chapter 290, in this respect. This chapter contains so many specific instructions to seek out and direct the tax so as to properly and fairly reflect taxable net income assignable to this State that further specific reference is unnecessary. That is the import of all its provision taken as and harmonized as a whole. At the very least, it is plain the Legislature contemplated that some of the income of non-Minnesota business corporations doing business partly within and partly without Minnesota is beyond the reaches of the Minnesota tax. The income from short term investments here involved is that sort of income and is not subject to the Minnesota tax.

Our Supreme Court's latest pronouncement on the subject in *Skelly Oil Co. v. Commissioner of Taxation*, — N. W. (2d) —, — Minn. —, so holds in a case where the different operations or activities of the same company constitute separate businesses. There, as here, a single company engaged in different business activities. There Skelly's production activities and its marketing activities were different. The production was non-Minnesota, the marketing was

partly within and partly without Minnesota. The Court held that Minnesota could include in the measure of its tax only such income as is attributable to the marketing activity. There, the Court specifically said that Minnesota could not include any income in the measure of the tax if the included income is not fairly attributable to the activity carried on within Minnesota. That is the case here. The short term investment income is not fairly attributable to Minnesota. It is not attributable to Minnesota at all.

We have carefully examined the authorities cited and it is our opinion that if the statute were intended to reach the disputed income here grave questions of constitutionality would be presented. In view of the Findings and Decision here, we do not reach that question.

MINNESOTA BOARD
OF TAX APPEALS
William W. Essling
Ernest J. Messner
John Knapp

[Clerk's certificate omitted.]